SUPREME COURT, U.S.
JUL 22 1966
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Supreme Court of the United States

OCTOBER TERM, 1965

No. 378

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

—against—

JOSEPH SKIBINSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—against—

JOSEPH SKIBINSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the divided United States Court of Appeals for the Second Circuit, entered in the above entitled case on March 31, 1966, and the denial on April 27, 1966 of petitions for rehearing and rehearing *in banc*, which judgment affirmed a final judgment, entered in the United States District Court for the Southern District of New York on June 23, 1965, granting Respondent a recovery against Petitioner in the amount of $60,870.97.

Citations to Opinions Below

Both the majority opinion of the Court of Appeals and the dissenting opinion of Circuit Judge Friendly are printed in Appendix A hereto, *infra*, p. 13, and are offi-

cially reported in 360 F. 2d 539. The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 25, is reported in 242 F. Supp. 290.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix C hereto, *infra*, p. 49, was entered on March 31, 1966. Timely petitions for rehearing and rehearing *in banc* were filed on April 13, 1966. Such petitions were denied by orders entered April 27, 1966, which are printed in Appendix D hereto, *infra*, p. 51. This petition for a writ of certiorari is filed within ninety (90) days after the denial of the petitions for rehearing and rehearing *in banc*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Questions Presented

1. Where it has been admitted and conceded that the shipowner-petitioner supplied the stevedore's employees, including the plaintiff, with proper and sound equipment in all respects, is the shipowner nonetheless liable for a breach of warranty of seaworthiness where the injured longshoreman's fellow-employees improperly used that sound equipment and caused the plaintiff's injuries?
2. Is a non-negligent shipowner, who has supplied all necessary gear in sound condition, the insurer of a longshoreman injured solely by his co-employees' misuse of such gear?
3. Is there not an area in the law where the "operational negligence" of the injured longshoreman's fellow-employees is an incident of the stevedoring operation,

in control of the stevedore-employer, so that there is no unseaworthiness liability imposed on the shipowner?

4. If the facts in this matter constitute a breach of the warranty of seaworthiness, is it not then true, and does it not necessarily follow, that the shipowner is always liable to an injured longshoreman with a trial necessary only for the computation of damages?

Statement of the Case

This action was instituted by the Respondent, Skibinski, a longshoreman, to recover damages from the Petitioner, Waterman, the shipowner, for personal injuries sustained aboard the S.S. MADAKET on November 24, 1958. Such injuries were alleged to have been caused by Waterman's negligence and breach of warranty of seaworthiness. Federal jurisdiction was predicated upon the diversity of citizenship existing between Skibinski (New York) and Waterman (Alabama) with the amount in issue exceeding $10,000.00, exclusive of interest and costs.

The Trial Judge expressly found that Waterman was not negligent. Waterman's liability to Skibinski was predicated solely upon the breach of the seaworthiness warranty under factual circumstances which, Waterman urges, are not embraced by such warranty.

The judgment of the District Court was affirmed by the Court of Appeals, with Circuit Judge Friendly dissenting.

The operative facts respecting the issue of seaworthiness were undisputed and, indeed, gave rise to cross-motions for judgment upon the opening addresses to the jury (which was thereafter waived during the course of the trial). These facts, which are set forth in detail

in the opinion of the District Court (p. 25, *infra*), may fairly be summarized as follows:

On November 24, 1958, Skibinski and several other longshoremen, all in the employ of International Terminal Operating Co., Inc., an independent stevedoring concern, boarded Waterman's vessel, the S.S. MADAKET, for the sole purpose of welding the #4 coaming ladder back into place. This ladder had been burnt off three days earlier by the longshoremen to facilitate a discharge operation, and it was lying on the main deck between hatches #4 and #5.

Skibinski and another longshoreman descended to the #4 lower hold and there re-welded the brackets to which the ladder itself would be welded. After the brackets were welded, the ladder was to be lowered to Skibinski by his co-workers on the main deck.

The three longshoremen who were working on the main deck there found both an open "S" shaped cargo hook and a closed shackle. The shackle resembled a horse-shoe with a screw-type locking pin closing off the open end, and both it and the "S" hook were part of the ship's equipment. Instead of lowering the ladder on the closed and locked shackle the longshoremen lowered it on the open "S" hook. They merely placed the open end of the "S" hook under the top rung of the ladder. As the foot of this rigid ladder touched the floor of the lower hold, it slid off the open "S" hook and fell onto Skibinski.

It was the use of the open "S" hook by the longshoremen and their failure to use the closed shackle which Skibinski claimed constituted a breach by Waterman of the warranty of seaworthiness (R. 35a-37a).* And, it was the

* This, and all subsequent references herein, are to pages of Petitioner's Appendix in the Court below, which is contained in Volume I of the Record hereto.

longshoremen's use of the open "S" hook instead of the closed shackle which both the District Court and the Circuit Court felt constituted a breach by Waterman of the warranty of seaworthiness.

It is most important to note that it was conceded by, and stipulated to on behalf of, Skibinski that the open "S" hook was neither broken nor defective (R. 37a, 39a); that it was a seaworthy hook being put to a use and to an operation for which it was not intended (R. 35a-36a, 39a-40a); that the ladder should properly have been lowered on the closed shackle rather than the open "S" hook (R. 35a-40a); and that the necessary closed shackle was available to the longshoremen and was, indeed, in their very hands (R. 40a).

Reasons for Granting the Writ

1. The Decision Below Conflicts With That of This Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, in at Least Two Respects.

(A) After tracing the genesis and development of the shipowner's warranty of seaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S. Ct. 926, 933, this Court concluded:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354."

In the instant case, under the conceded facts, Waterman furnished "a vessel and appurtenances reasonably fit for their intended use". The open "S" hook which the longshoremen, on their own volition, chose to use was a sound piece of gear being put to a task for which it was *not* intended; and a closed shackle which properly should have been used to lower the ladder had been supplied to the longshoremen by Waterman, but was not used by the longshoremen, again on their own volition. These conceded facts show that Waterman amply discharged the duty imposed upon it by the warranty of seaworthiness, as enunciated by this Court in *Mitchell, supra.* Imposing liability upon Waterman under the circumstances here presented is, in effect, imposing upon it the duty to supply "an accident-free ship", which *Mitchell* expressly declared not to be the duty of a shipowner.

In so far as a longshoreman working aboard ship is concerned, an accident to him can realistically stem from only four possible causes. It may stem from a *mechanical failure* in either (1) ship's equipment or (2) stevedore's equipment; or it may stem from *human error* on the part of either (3) ship's personnel or (4) longshoremen. Examining these four possible causes of accident to longshoremen, we see that the law, developed by this Court to date, has granted recovery for the first three only.

Defective ship's equipment renders a vessel unseaworthy, *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (a defective shackle); and *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455 (a defective piece of rope).

Defective stevedore's equipment also renders a vessel unseaworthy, *Alaska S.S. Co.* v. *Petterson,* 347 U.S. 396, 74 S. Ct. 601, aff'g 205 F. 2d 478. Hence, a longshoreman is guaranteed a recovery against a shipowner for injuries produced by *any mechanical failure* aboard ship.

The third possible cause of an accident to a longshoreman is the negligence of the shipowner's personnel. For such negligence of its personnel, the shipowner is liable, *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 206, 83 S.Ct. 1185.

To now impose liability upon a shipowner for the negligent acts of longshoremen (the remaining fourth possible cause of an accident) is, therefore, equivalent to declaring a shipowner liable to a longshoreman injured aboard ship under *any* circumstances.

Liable, as it is, to a longshoreman injured by defective equipment of either the shipowner or the stevedore, or by a negligent act of shipowner's personnel, expansion of liability to include stevedore's negligence exhausts all reasonably possible accident causes. Such expansion is, therefore, tantamount to imposing an insurer's obligation on a shipowner.

To make a shipowner, who has supplied all necessary and proper equipment in sound condition, liable to a longshoreman injured solely because his co-workers misuse the same is to take away from a shipowner the only defense available to him today, i.e., that he supplied "a vessel and appurtenances reasonably fit for their intended use". What other possible defense can a shipowner have to a longshoreman's action for personal injuries sustained aboard ship? In holding Waterman liable under the circumstances of this case, the Court below in reality saddled it with an obligation to supply "an accident-free ship". Conflicting as it does with this Court's decision in *Mitchell*, the ruling of the Court below must be reversed.

(B) In *Mitchell, supra*, this Court interred the "transitory unseaworthiness" rule of cases such as *Cookingham* v. *United States*, 184 F. 2d 213, and held that seaworthiness

or unseaworthiness is not be judged by any temporal standard.

In the instant case, however, a temporal standard is used by the Court of Appeals as a measure of unseaworthiness. The negligent use of the open "S" hook, rather than the closed shackle, to lower the ladder has been found to have taken "a substantial amount of time" (which the record discloses was less than ten minutes) and to have, therefore, ripened into unseaworthiness.

Indeed, as the dissenting opinion of Circuit Judge Friendly makes clear, not only does the majority opinion resurrect the temporal standard, but it requires the use of a stopwatch more sensitive than those currently available.

If, just as in *Mitchell,* an unseaworthy condition was not rendered seaworthy because of its shortened existence or transitory nature, so, in the instant case, the putting of a concededly seaworthy hook to an unintended use for some period of time less than ten minutes does not render the vessel unseaworthy.

In resurrecting such temporal standard and reintroducing transitory concepts to the seaworthiness doctrine, the Court below has squarely collided with the principle enunciated by this Court in *Mitchell.*

2. There Is Both Intra and Inter Circuit Conflict on the Questions Here Presented.

The various decisions of the United States Court of Appeals for the Second Circuit in cases involving shipowner's liability for negligent performance by longshoremen have conflicting results dependent more upon the makeup of the panel determining the matter than upon any factual distinction in the cases themselves. Thus, one

cannot distinguish between cases such as the instant one, *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (2 Cir. 1950), *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956), and *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2 Cir. 1965), wherein recovery was granted the injured longshoremen, and cases such as *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752 (2 Cir. 1962), *Spinelli* v. *Isthmian S.S. Co.*, 326 F. 2d 870 (2 Cir. 1964), *Massa* v. *C.A. Venezuelan Navigacion*, 332 F. 2d 779 (2 Cir. 1964), and *Guarracino* v. *Luckenback S.S. Co.*, 333 F. 2d 646 (2 Cir. 1964), wherein a shipowner supplying safe and proper equipment was exonerated from any liability to a longshoreman who was injured by his co-workers' misuse of such equipment. As stated in the dissenting opinion of Circuit Judge Friendly, a review of these cases fails to disclose any:

> "* * * meaningful difference either in the ship's performance or the plaintiff's deserts.
>
> It is time to scuttle a doctrine which requires Judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more than casuistry."

A similar state of conflict and confusion exists in other Circuits as well. Thus, the rationale of *Mesle* v. *Kea Steamship Corporation*, 260 F. 2d 747 (3 Cir. 1958), and *Knox* v. *United States Lines Co.*, 320 F. 2d 247 (3 Cir. 1963), is completely at odds with that of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964) and *Thompson* v. *Calmar Steamship Corporation*, 331 F. 2d 657 (3 Cir. 1964).

And, in the Ninth Circuit, cases such as *Morrell* v. *United States*, 297 F. 2d 662 (9 Cir. 1961), *Titus* v. *The Santorini*, 258 F. 2d 352 (9 Cir. 1958), *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962), and *Rawson* v. *Calmar Steamship Co.*, 304 F. 2d 202 (9 Cir. 1962), may not be reconciled with decisions such as *Blassingill* v. *Waterman Steamship Corporation*, 336 F. 2d 367 (9 Cir. 1964), and *Beeler* v. *Alaska Aggregate Corporation*, 336 F. 2d 108 (9 Cir. 1964), reversing 224 F. Supp. 814.

The presence of conflict, rather than constancy, both in and between the various Circuits on the issue of shipowner's liability for the negligence of longshoremen has resulted in a chaotic situation requiring establishment of proper guide lines by this Honorable Court.

3. The Importance of the Issues.

Where the co-ordinates of liability or non-liability are fairly well established, personal injury actions are in the main settled. The overwhelming percentage of personal injury accidents which are tried are those where the co-ordinates of liability or non-liability are uncertain, unclear, and in conflict. The instant action, where the facts were undisputed, is an excellent illustration of an action which has been tried to conclusion only because of the host of conflicting opinions throughout the country on the legal issues. As stated by Circuit Judge Friendly in the first sentence of his dissenting opinion herein, it is this type of case that is presenting itself "in increasing numbers".

It should be noted parenthetically that the conflicting opinions of various Courts of Appeal, some of which have been cited above, represent but a fraction of the varied spectrum of opinion expressed by District Judges during the course of trial and pre-trial.

The increasing and continuing number of cases involving the issue of a shipowner's liability for longshoremen's negligence warrants a definitive ruling, which can come only from this Honorable Court, to re-establish the rule of law.

With the many conflicting Court of Appeals decisions on the books today, any individual District Judge or any three-member Circuit Court panel can readily find precedent for whatever result they wish to obtain. In such situation, obviously, cases are resolved more on the basis of the emotional makeup of a single District Judge or Court of Appeals panel than on a rule of law. The absence of a controlling rule of law has obviously worked injustice on either a number of longshoremen or a number of shipowners who have been unable to ascertain why others of their class, in similar circumstances, have obtained much more favorable judicial results. Such injustice will continue until the rule of law is once again established by a definitive decision from this Honorable Court.

As so aptly stated by Circuit Judge Friendly in his dissenting opinion herein, if maritime workers require further assistance from society, the remedy does not lie:

> "* * * in judicial legerdemain which helps one longshoreman but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law."

Although emanating from the opposite pole, another eminent jurist, the late Circuit Judge Clark, in his dissenting opinion in *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752, 757, indicated his disappointment

with the absence of a definitive opinion on these issues and their components and voiced some prayer for such a decision from this Honorable Court.

The most recent decision of the Court of Appeals for the Second Circuit on these issues, again by a divided court, was handed down on July 18, 1966 in *Radovich* v. *Cunard Steamship Co., Ltd.*, and both the majority and the dissenting opinion of Circuit Judge Kaufman are printed in Appendix E hereto, *infra*, p. 53. These opinions are further evidence of both the existing conflict and the importance of the issues, and further demonstrate the need for review by this Honorable Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
Of Counsel

July 19, 1966

APPENDIX A

Opinion of the Circuit Court

360 F. 2d 539

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 232—September Term, 1965.

(Argued January 25, 1966 Decided March 31, 1966.)

Docket No. 30065

JOSEPH SKIBINSKI,

Plaintiff-Appellee,

—v.—

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellant.

Before:

FRIENDLY, HAYS, *Circuit Judges,* and
DOOLING, *District Judge.**

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* Of the Eastern District of New York, sitting by designation.

Opinion of the Circuit Court

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* sitting without a jury, awarding damages to plaintiff for injury resulting from a breach of the shipowner's warranty of seaworthiness.

Affirmed.

WILLIAM A. BLANK, Brooklyn, New York (Wilfred L. Davis, and Robert Halper, Brooklyn, New York, on the brief), *for Appellee.*

JOSEPH ARTHUR COHEN, New York, New York, (Sidney A. Schwartz, Alexander, Ash & Schwartz, of counsel), *for Appellants.*

HAYS, *Circuit Judge*:

We are here concerned with the question of liability for injuries suffered by plaintiff Skibinski, an employee of the International Terminal Operating Co., Inc., a stevedoring concern and the third-party defendant-appellant herein. When Skibinski was injured, he was working in the cargo hold of the defendant's ship *Madaket* from which Terminal was engaged in unloading a cargo of sugar. The issue is whether Skibinski's injury was caused by the unseaworthiness of the *Madaket.* We affirm the district court which held that the injury was caused by the ship's unseaworthiness.

There is evidence in the record to support the conclusion that the injury occurred in the following way:

Terminal, in order to facilitate the unloading operation, obtained permission to remove temporarily from the cargo

hold a one ton steel ladder that was affixed to the ship's structure by welded steel brackets. Skibinski, a welder, was assigned to use his welding equipment to burn off the ladder and brackets. Three days later, the unloading operation having been completed, Skibinski, and a co-worker named Stuve, returned to the vessel to reaffix the ladder, which was lying on the main deck.

Skibinski and Stuve first welded the brackets and then gave the word to lower the ladder. The ladder was to be lowered by three longshoremen, also in the employ of Terminal. Since there was inadequate space to permit the lowering of the ladder at the place it was to be reaffixed the longshoremen devised a plan, which was described as follows:

> "(1) lowering the ladder through the open middle section of the hatch; (2) laying it down flat on the bottom of the hold; (3) uncoupling the fastening mechanism by which it was lowered; (4) retrieving the fall; (5) lowering the fall again through the opening between the beams and the aft end of the hatch; (6) recoupling the fastening mechanism; (7) dragging the ladder to the aft end of the hold and lifting it into position."

Skibinski v. *Waterman Steamship Corporation,* 242 F. Supp. 290, 294 (S. D. N. Y. 1965).

In order to lower the ladder through the hatch the longshoremen inserted an open mouth, "S" shaped cargo hook under the top rung of the ladder. Then, with one of the longshoremen operating the winch, the ladder was raised from the deck, positioned over the middle section of the hatch, and lowered. When the foot of the ladder reached the floor of the hold, the ladder disengaged itself from

the hook, and rebounded against Skibinski, who, as the district court found, "was in the wings bending over his tools in preparation for his task."

The district court held that "the use of the open mouth cargo hook and the falling ladder were proximate causes of plaintiff's injury."

Before reaching the principal issue itself, we must determine whether Skibinski was within the class protected by the warranty of seaworthiness. The resolution of this issue turns upon whether Skibinski was engaged in the type of work traditionally done by seamen. See, e.g., *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 412-13 (1953); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 98-99 (1946); *Lawlor* v. *Socony-Vacuum Oil Company*, 275 F. 2d 599, 602 (2d Cir. 1960). In *Pope & Talbot, Inc.* v. *Hawn, supra* at 413, where a shore based carpenter, employed by an independent contractor, was injured while repairing grain loading equipment, the Supreme Court held:

> ". . . [L]egal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

See *The Tungus* v. *Skovgaard,* 358 U. S. 588, 595 n. 9 (1959).

Here, Skibinski had been working steadily repairing sugar ships for about four years prior to the accident. The work which he performed often required no welding at all. Wheeler, an expert witness, who was called by appellants, answered affirmatively the district court's question:

> "As a matter of tradition and custom in the days prior to the advent of steel ladders welded to brackets on the ship's structure, would it have been the duty and function of a member of the vessel's crew to affix, remove or replace a ladder in the ship's hold, when necessary or desirable, in relation to loading or unloading operations?"

"That the owner seeks to have . . . [a traditional seamen's job] done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 96 (1946).

The district court was correct in finding that Skibinski was within the coverage of the warranty of seaworthiness.

On the issue of seaworthiness appellants argue that the "misuse of seaworthy equipment by plaintiff's co-workers in putting it to an unintended use, and their failure to properly use the proper equipment available to them and in their hands, falls without the ambit of the warranty of seaworthiness."

The open mouth hook used by the three riggers to lower the ladder into the hatch was unsuitable for the use to which it was put. Improper use of otherwise sound equip-

ment may give rise to a condition of unseaworthiness. See *Reid* v. *Quebec Paper Sales & Transportation Company,* 340 F. 2d 34 (2d Cir. 1965); *Grillea* v. *United States,* 232 F. 2d 919 (2d Cir. 1956). Unseaworthiness is not excused on the ground that it was caused by the acts of fellow servants. See *Mahnich* v. *Southern S.S. Co.,* 321 U. S. 96 (1944); cf. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, 427 (1959). Nor is it excused because proper equipment was available but went unused. See *Mahnich* v. *Southern S.S. Co., supra; Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, 556 (2d Cir. 1950).

This case also presents the question of whether the defect "should be considered as an incident in a continuous course of operation" and not as an unfitness of the ship. *Grillea* v. *United States,* 232 F. 2d 919, 922 (2d Cir. 1956). In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship. See *Puddu* v. *Royal Netherlands Steamship Company,* 303 F. 2d 752, 757 (2d Cir.), cert. denied, 371 U. S. 840 (1962) (Hays, *J.*, concurring).

Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put. The use of this apparatus took a substantial amount of time, so that the apparatus became part of the *Madaket's* equipment. See *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539 (1962).

Recently, in *Reid* v. *Quebec Paper Sales & Transportation Company,* 340 F. 2d 34, 35 (2d Cir. 1965), where a portable ladder was left unsecured, we said:

> "Under the circumstances it was necessary for the ladder to be secured in some fashion when it was being

used, and unless it was so secured, it was unfit for its intended use. An unsecured and dangling ladder under the conditions existing at the time of the accident posed a serious threat to the safety of those standing below in the hold, regardless of whether the shipowner knew it was unsecured and regardless of how quickly this threat materialized."

See *Strika* v. *Netherlands Ministry of Traffic, supra; Grillea* v. *United States, supra.*

Massa v. *C. A. Venezuelan Navigacion,* 332 F. 2d 779 (2d Cir. 1964), *Spinelli* v. *Isthmian Co.,* 326 F. 2d 870 (2d Cir.), cert. denied, 377 U. S. 935 (1964) and *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752 (2d Cir.), cert. denied, 371 U. S. 840 (1962), are all distinguishable since they were thought to involve transitory situations which had not yet ripened into unseaworthiness. Each arose "as a momentary step or phase in the progress of work on board," and was "considered as an incident in a continuous course of operation." *Grillea* v. *United States, supra* at 922.

On the basis of the evidence before it the trial court was justified in holding that Skibinski's injury resulted from the unseaworthiness of the ship.

Appellants claim that Skibinski was contributorily negligent because at the time of the accident he was beneath the center of the hatch with his hands grasping the descending ladder. The argument is predicated upon the testimony of Stuve, Skibinski's co-worker, and inferences to be drawn from the location of appellee's injuries. Skibinski contends that he was against the skin of the ship, with his back to the space beneath the center of the hatch, and was bending over picking up tools, when the ladder crashed to the floor

and rebounded against him. Thus the testimony at the trial was contradictory. Appellee's medical witness could not "reconstruct from . . . [Skibinski's] injuries the exact manner in which the trauma occurred." The district court "paid particular attention to the demeanor of the witnesses," and found that "from a quantitative and qualitative viewpoint based upon the entire record . . . [appellants] have failed to sustain their burden of proof, by a preponderance of the evidence, that plaintiff was contributorily negligent." We cannot say that this finding is clearly erroneous.

Affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

This case, like others that come to us in increasing numbers, falls between two reasonably plain lines of authority. If a ship has equipment safe for a task, and only that, she is not rendered unseaworthy by a seaman's failure to use what has been provided for him. *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. denied, 369 U. S. 843 (1962); *Guarracino* v. *Luckenbach S.S. Co.*, 333 F. 2d 646 (2 Cir.), cert. denied, 379 U. S. 946 (1964). On the other hand, if a seaman is injured by use of unsafe equipment, e.g., a rope with a latent defect, the ship cannot escape liability for unseaworthiness because safe equipment also was available. *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 103-04 (1944). Here the lifting gear the ship turned over to the stevedore was entirely sound; every piece of it was staunch, solid and suited to its intended use. Plaintiff's injury resulted solely from the negligent manner in which the stevedores employed it.

The problem whether a ship becomes unseaworthy when stevedores put safe equipment to improper use was first presented to this court in *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, 556 (2 Cir. 1950), cert. denied, 341 U. S. 904 (1951). Judge Learned Hand decided it in favor of the plaintiff rather cavalierly, saying, "In answer we need only cite Mahnich v. Southern S.S. Co." Later, evidently realizing that *Mahnich* was not truly dispositive and the question thus not so easily dispatched, he engaged in further elaboration: although it "would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy," the two situations must nevertheless be separated on the particular circumstances of each case. *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956). Judge Swan dissented in both cases, insisting in *Grillea* that "the long recognized distinction between injuries caused by unseaworthy gear and injuries caused by improper use of proper gear" had not been "completely wiped out" by Supreme Court decisions. 232 F. 2d at 924.

Our efforts to carry out Judge Hand's mandate in *Grillea*, a principle which my brother Hays has characterized as "far from satisfactory," *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752, 757 (2 Cir. 1962), have been wholly unsuccessful—perhaps because we have not correctly apprehended just what Judge Hand meant. I cannot see, for example, what meaningful distinction my brothers find between this case and *Massa* v. *C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2 Cir.), cert. denied, 379 U. S. 914 (1964); a rig in which one metal bar is connected with a top pallet and another with the bottom pallet seems just as unsea-

worthy to me as one in which a ladder is suspended on an open hook. But neither can I see any satisfactory distinction between *Massa* where the stevedore lost and *Strika* where he won. If the test is a temporal one, a more accurate stopwatch than I possess would be needed to explain why *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34 (2 Cir. 1965), should have gone one way and *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752 (2 Cir.), cert. denied, 371 U. S. 840 (1962), and *Spinelli* v. *Isthmian S.S. Co.*, 326 F. 2d 870 (2 Cir.), cert. denied, 377 U. S. 935 (1964), the other.[1] What is more important, taking all six cases—*Strika, Grillea, Reid, Puddu, Spinelli* and *Massa*—the first three going for the plaintiff and the last three for the ship, I fail to see any meaningful difference either in the ship's performance or the plaintiff's deserts.

It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more than casuistry. Indeed, I suspect we would long since have revolted against a principle which capriciously imposes liability on a thoroughly well equipped ship if we did not know that in the usual case, where the plaintiff "seaman" is shore-based, the story will have a happy ending for the ship since liability will rest on her only for a moment and then will be transferred to the stevedoring contractor. By very definition, improper use of ship's equipment triggers the contractor's warranty of workmanlike service, *Ryan Stevedoring Co.* v. *Pan-*

[1] The hypothetical case put in *Grillea*, 232 F. 2d at 922, where longshoremen had left the ship in an unseaworthy condition and were injured on their return the next day, would rest on an intelligible distinction.

Atlantic S.S. Corp., 350 U. S. 124 (1956), the ship regularly impleads the stevedore, and there the burden falls. To me this argues for a restrictive rather than an expansive notion of unseaworthiness in these situations; courts should not strain to use the ship, innocent in every realistic sense, merely as a conduit for imposing on the negligent employer a liability to his employees differing from the absolute but limited one which Congress made exclusive by §5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §905. Of course the statute did not impair an injured longshoreman's right against third parties who have wronged him, 33 U. S. C. §933. But proper respect for what Congress was "driving at," see *Johnson* v. *United States*, 163 Fed. 30, 32 (1 Cir. 1908) (Holmes, *J.*), ought to lead judges away from a doctrine which so frustrates the legislative purpose by imposing a transitory liability on a third party that has turned over a thoroughly seaworthy vessel to a qualified stevedore. If the benefits under the Compensation Act are inadequate, the remedy lies in action by Congress, not in judicial legerdemain which helps one longshoreman but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law.

My view necessarily rests on the assumption, which I believe to be sound, that the issue has not been settled otherwise by the Supreme Court. Although the Court has indeed expanded the notion and the coverage of unseaworthiness, it has not yet dealt with the problem of a momentarily unsafe condition created solely by negligence of stevedores in the course of their work; in the one instance

in which it cited this aspect of the *Grillea* decision, the Supreme Court did not endorse this court's holding, declaring that it "need not go so far" since the winch had been "adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand." *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, 427 (1959). The *Strika* decision was approved in *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206, 215 (1963), but only in its holding that a ship was liable for effects of unseaworthiness realized on shore. And while I recognized that *Morales* v. *City of Galveston,* 370 U. S. 165 (1962) is distinguishable, it at least shows that a condition created in loading a vessel can be too momentary to render her unseaworthy.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#170—149-249

JOSEPH SKIBINSKI,

Plaintiff,

—against—

WATERMAN STEAMSHIP CORPORATION,

Defendant and Third-Party Plaintiff,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

APPEARANCES:

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IRVING BEN COOPER, D.J.

These actions arise out of personal injuries allegedly sustained by plaintiff Joseph Skibinski.

His complaint alleges that on November 24, 1958 while in the employ of a stevedoring company, International Terminal Operating Co. (hereinafter I.T.O.), he was injured aboard the S.S. Madaket, a vessel owned and operated by defendant Waterman Steamship Corp. (hereinafter Waterman). Skibinski further alleges that his injuries, incurred in furtherance of Waterman's business, were due to the unseaworthiness of the vessel, its appliances and parts and the negligence of Waterman, its agents, servants and employees.

Waterman's answer denies negligence and unseaworthiness and assets by way of affirmative defense that any injuries received by Skibinski were due to (1) his contributory negligence and (2) negligence of persons for whose conduct defendant is not liable.

Waterman impleaded I.T.O. as third-party defendant alleging that if the acts of negligence and improper conditions averred by plaintiff did occur, they were created and permitted to exist by failure of I.T.O. to perform its contractual duties—a breach of I.T.O.'s warranty of workmanlike service. Waterman thus seeks indemnity if held liable in the main action.

I.T.O.'s amended answer denies responsibility for the accident and liability to indemnify Waterman. In addition, it asserts two counterclaims: (1) against plaintiff, on the theory that plaintiff was primarily at fault and should indemnify I.T.O. in the amount, if any, for which it is held accountable to Waterman and (2) against Waterman, on the theory that Waterman was at fault, breached its warranty of seaworthiness and thus should indemnify I.T.O.

Trial commenced before this Court and a jury on December 21, 1964. On December 29, when proof on the main action was completed, all counsel stipulated in open court to waive trial by jury. This Court assumed the responsibility of trier of fact and the jury was dismissed. Further proof, the parties agreed, as to the indemnity claims is to be continued after the Court determines the merits of the main action.

Facts

A one ton steel ladder struck Joseph Skibinski while he was working in the depths of the hold under Hatch #4 of the S.S. Madaket on November 24, 1958. The injuries which befell him were not the result of an honest mistake in judgment or mere negligence, but rather, as shipowner's counsel conceded and the record overwhelmingly establishes, stupidity—*"criminal stupidity"* in the use of ship's equipment as put in motion to lower the ladder into the ship's hold for rewelding to the ship's structure (Tr. 36).

The material facts are not in dispute. The S.S. Madaket docked at the National Sugar Refinery Pier, Long Island City, New York on November 19, 1958 to discharge a cargo of bulk sugar. The unloading process called for the use of payloaders to scoop sugar from the wings of the hold at Hatch #4 and deposit it into the middle of the hold where

it would then be removed by clam-shell type buckets suspended from a shoreside crane. A stationary steel ladder, affixed to the ship's structure by welded steel brackets, stood vertically from the bottom of the aft end hold under the hatch to almost top deck. Payloaders would be unable to reach the bulk sugar in the wing section behind the ladder. I.T.O. thus sought and obtained ship's permission to temporarily remove the ladder in order to facilitate the unloading operation (Tr. 746).

It was for this purpose that Skibinski came on board the S.S. Madaket on Friday, November 21, 1958. Having received permission to use his welding equipment, he burnt off the ladder and brackets, and they were removed from the hold. Payloaders were brought in, and by the following Monday the sugar was discharged.

At approximately 8:30 a.m. on Monday, November 24, Skibinski returned to the vessel to reaffix the ladder to the ship's structure (Tr. 139). As required, he received from the ship permission to proceed with use of the welding equipment (Tr. 136-8, 140, 528, 534). No sugar was to be discharged from Hatch #4; the sole remaining job in the unloading operations was the lowering and rewelding of the one ton steel ladder (I.T.O. Exhibit I).

Three of the ship's officers were on duty at that particular time (Tr. 534-5). Their responsibilities consisted in part of checking to see that the stevedores removed the cargo without damage to the vessel (Tr. 517, 548, 558-9). One officer testified that he always closely observed longshoremen engaged in operating the ship's winches (Tr. 558).

After setting up the welding equipment, Skibinski went down into the hold to replace the brackets he had removed three days earlier (Tr. 209-212). At about 9:20 a.m. he

finished welding the brackets and told (in what manner was not clearly established) a ship's mate that he should have the ladder sent down (Tr. 212-213).[1] The ladder had been hoisted to the main deck and laid between hatches four and five.

Topside, members of a four man deck gang employed by I.T.O., Perez, Scamporino and Vacante, were waiting at Hatch #4 to lower the ladder (Tr. 242). Not more than ten minutes before the time of the accident, which occurred between 10:00 a.m. and 10:30 a.m., they received orders to lower the ladder and immediately began the necessary preparations (Tr. 301, 550).

The first problem, reduced to its simplest terms, was the part of the hatch opening through which the ladder would be lowered. The ladder was to be replaced at the aft end of the hatch. Beams which support the hatch's cover, however, had earlier been rolled back to the fore and aft ends. The space between the beam farthest aft and the aft end of the hatch made it impractical, in the judgment of stevedore's deck men, to lower the ladder at that point. Rather, they agreed on a "plan" of action (Tr. 305-09; 320). It consisted of: (1) lowering the ladder through the open middle section of the hatch; (2) laying it down flat on the bottom of the hold; (3) uncoupling the fastening mechanism by which it was lowered; (4) retrieving the fall; (5) lowering the fall again through the opening between the beams and the aft end of the hatch; (6) recoupling the fastening mechanism; (7) dragging the lad-

[1] According to Skibinski he did not tell anyone from I.T.O. to lower the ladder (Tr. 43). Perez's and Scamporino's testimony to the contrary does not convince this Court. (Tr. 297-298, 392, 396, 411).

der to the aft end of the hold and lifting it into position (Tr. 244-5, 248-9, 252, 286, 361-4, 371, 403).

The second step in the preparations was to ready the fastening mechanism. The longshoremen found attached to the ship's winch located at Hatch #4 two married falls, two shackles, and an *open-mouth* or "S" shaped cargo hook. They unmarried the falls, uncoupled and placed aside the shackles and attached the cargo hook to a single fall. So attached, the hook and fall were brought over to the ladder. *Without any locking or steadying device, the open hook* was placed under the top rung of the ladder (Tr. 253-8), after which Scamporino, acting as winchman, raised the ladder and swung it into position over the center of Hatch #4. With Perez (alias "Speedy" and "Petey") acting as his signalman,[2] Scamporino proceeded to lower the ladder (Tr. 316-7, 319-20, 322, 398, 400-02, 412). The use of the open mouth cargo hook for this purpose, conceded by Waterman to be tantamount to "*criminal* stupidity," created a danger to all those working in the hold below (Tr. 38-9, 276-8, 324-5, 405, 678-9).

Although counsel stipulated that the open mouth cargo hook was neither defective nor broken (Tr. 62), without a locking device, *it was patently unsuitable* for the purpose to which it was put.

At a point when Scamporino could no longer see the bottom of the ladder, which was then but two or three feet

[2] There is some conflict in the testimony as to whether a signalman was used in lowering of the ladder. Perez testified that neither he nor anyone else acted as signalman for Scamporino because Scamporino could see the bottom of the hold and therefore acted as his own signalman. Scamporino, on the other hand, testified that Perez acted as his signalman and give him the order "come back." The Court accepts Scamporino's testimony.

from the floor of the hold, he was given a signal by Perez to "come back," a stevedore term meaning "lower away" (Tr. 400-03, 406-7, 412). The ladder thereupon became disengaged from the open cargo hook, dropped against the wall of the shaft tunnel running fore and aft in the hold, and rebounded against Skibinski who was in the wings, bending over his tools in preparation for his task[3] (Tr. 87, 93, 214-217).

The use of the open mouth cargo hook and the falling ladder were proximate causes of plaintiff's injury. (Tr. 38-9, 671-2).

Law

Warranty of Seaworthiness

The threshold question before this Court is whether plaintiff is entitled to the warranty of seaworthiness. Contrary to the contentions of Waterman and I.T.O., we find that he is.

I.T.O. in particular places great weight on *United New York & New Jersey Sandy Hook Pilot's Assn.* v. *Halecki,* 1959, 358 U.S. 613. It argues that Skibinski was aboard the S.S. Madaket to do a welding job requiring special equipment and a special license and, as in *Halecki,* was injured while performing work not traditionally done by seamen. As we see it, *Halecki* is inapposite to the case at bar.

In holding Halecki not entitled to the seaworthiness warranty, the Supreme Court did not find the use of specialized equipment by specially licensed workers the controlling

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[3] Further findings relating to where Skibinski was standing when hit by the ladder are discussed under the heading "Contributory Negligence," *infra.*

factor. Rather, the Supreme Court pointed to a variety of circumstances undercutting the historic doctrine's applicability. For example, the work was so specialized that the repair yard had to subcontract the job to an electrical firm. Moreover, the work could be done only when the ship was "dead," with its generators dismantled and at a time when all members of the crew were off the ship. 358 U.S. at 617-8. Such factors are absent here.

Also absent is the "dry-dock" situation where the ship is removed from navigation, a cardinal factor in other cases relied on by I.T.O. and Waterman to support their view that Skibinski is not entitled to the warranty of seaworthiness. See *West* v. *United States,* 1959, 361 U.S. 118; *Raper* v. *United States,* 1961, 368 U.S. 20; *Guerrini* v. *United States,* 2 Cir., 1948, 167 F.2d 352, cert. denied, 1948, 335 U.S. 843; *Martini* v. *United States,* 2 Cir., 1951, 192 F.2d 649, cert. denied, 1960, 364 U.S. 827. Those cases are not controlling here.

The relevant test, promulgated by the Supreme Court and adopted by this Circuit to determine whether plaintiff is entitled to the warranty of seaworthiness is: Was plaintiff on the day of the accident performing the "type of work traditionally done by members of the [ship's] crew?" *Seas Shipping Co.* v. *Sieracki,* 1946, 328 U.S. 85; *Pope & Talbot, Inc.* v. *Hawn,* 1953, 346 U.S. 406; *Alaska S.S. Co.* v. *Petterson,* 1954, 347 U.S. 396; *West* v. *United States, supra; Lawlor* v. *Socony-Vacuum Oil Co.,* 2 Cir., 1960, 275 F.2d 599; *Shenker* v. *United States,* 2 Cir., 1963, 322 F.2d 622; *Torres* v. *Kostor,* 2 Cir., 1955, 227 F.2d 664. See Edelman, Maritime Injury and Death (1960) 176-7.

Thus, as was the case in *Halecki, supra,* 358 U.S. at 618, we are not concerned only the title Skibinski held or the

precise technology of the tools with which he labored, but rather with the nature of the work he did and its relation to the ship and the applicability of the historic doctrine of unseaworthiness. See *Halecki* v. *United N.Y. & N.J. Sandy Hook Pilots Assn.*, 2 Cir., 1958, 251 F.2d 708, 711, rev'd and remanded on other grounds, 1959, 358 U.S. 613.

Skibinski was not on board the S.S. Madaket merely as a specialist to cope with the generic problems relative to maintenance and repair of the ship's structure, its navigation or propulsion facilities, or stowage. As with the longshoremen who ran the payloaders and the winches, so too, plaintiff was on board the vessel to facilitate and effect the unloading of sugar from the ship's hold.

In addition, I.T.O.'s own expert witness, William Wheeler, testified, and we so find, that it would be within the duty and function of a ship's crew as a matter of tradition and custom in the days of old, prior to the advent of steel ships and steel ladders, to remove or replace a ladder (whether made of wood or other construction) when necessary or desirable for purposes of loading or unloading cargo (Tr. 717-9. See also 763).

Working in the depths of the hold in furtherance of ship's business at the time of falling danger from above,

> [Plaintiff's] need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were entitled to like treatment under law.

(*Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U.S. at 413)

Accordingly, applying the relevant test, we find that Skibinski (as was true of his fellow longshoremen who

actually participated in the physical removal of cargo) performed work traditionally done by the ship's crew. In so doing, on a vessel moored in navigable waters over which the ship's crew had general control, he was entitled to the warranty of seaworthiness; we undertake to recognize it now in these proceedings.

Seaworthiness

Waterman and I.T.O. argue that the stipulated facts, especially the concession that the cargo hook from which the ladder fell was neither patently nor latently defective, require a finding as a matter of fact and law that the vessel was not unseaworthy. We cannot agree. The circumstances of this case, quite the contrary, require a holding that the S.S. Madaket was in fact unseaworthy.

It is now well established that a shipowner is liable to indemnify a longshoreman for injuries caused by the unseaworthiness of a vessel. "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo or the manner of its stowage might be improper." *Morales* v. *City of Galveston*, 1962, 370 U. S. 165 at 170; see *The Osceola*, 1902, 189 U. S. 159; *Mahnich* v. *Southern S.S. Co.*, 1944, 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki*, *supra*; *Pope & Talbot, Inc.* v. *Hawn*, *supra*; *Bouden* v. *Lykes Bros. S.S. Co.*, 1955, 358 U. S. 336; *Crumady* v. *The J. H. Fisser*, 1958, 358 U. S. 423.

While the duty imposed upon a shipowner to furnish a seaworthy ship does not require maintenance of an accident free ship, *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539; *Guiterrez* v. *Waterman S.S. Corp.*, 1963, 373

U. S. 206, the shipowner is held to its duty of providing a seaworthy vessel even though the ship's unseaworthiness is created not by its own acts but rather by the acts or negligence of a third party specifically hired to do specialized work aboard ship (e.g. I.T.O.). *Mahnich* v. *Southern S.S. Co., supra, Alaska S.S. Co., Inc.* v. *Petterson,* 1954, 347 U. S. 396; *Rogers* v. *United States Lines,* 1954, 347 U. S. 984; *Grillea* v. *United States,* 2 Cir., 1956, 232 F. 2d 919; *Massa* v. *C. A. Venezuelan Navigacion,* 2 Cir., 1962, 298 F. 2d 239, cert. denied, 1964, 379 U. S. 914; *Mosley* v. *Cia. Mar. Adra, S.A.,* 2 Cir., 1963, 314 F. 2d 233, cert. denied, 1963, 375 U. S. 829; *Reid* v. *Quebec Paper Sales & Trans. Co., Ltd.,* 2 Cir., 1965, F. 2d (sl. op. 593ff).

The non-delegable nature of the shipowner's duty to furnish a seaworthy ship requires, moreover, that shipowner cannot relieve itself of this responsibility merely by delegating the work to a third party (e.g. stevedore) not in its direct employ. *Alaska S.S. Co.* v. *Petterson, supra; Rogers* v. *United States Lines; supra, Shenker* v. *United States, supra; Reid* v. *Quebec Paper Sales & Transportation Co., Ltd., etc., supra.* The basic consideration underlying the non-delegable nature of shipowner's duty have been outlined by the Supreme Court:

> [Shipowner] is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost.
>
> • • •
>
> "These and other considerations arising from the hazards which maritime service places on men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating

> the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Co.* v. *Sieracki,* at p. 94. See *Poignant* v. *United States,* 2 Cir., 1955, 225 F. 2d 595; *Grillea* v. *United States, supra.*

The concept of unseaworthiness and its non-delegable nature are, of course, relative, dependent for definition upon the particular facts of each case. *Mosley* v. *Cia. Mar. Adra, S.A., supra.*

Judge Learned Hand in *Strika* v. *Netherlands Ministry of Traffic,* 2 Cir., 1950, 185 F. 2d 555, cert. denied, 1951, 341 U. S. 904, held that longshoremen's use of two "bridles" instead of one in lifting a "pontoon" was unsuitable for that purpose and the ship thereby became unseaworthy. In *Strika,* the longshoremen crew was attempting to lift a heavy metal "pontoon" from the dock by fastening it with two "bridles" to the ship's winches, booms and falls. The "pontoon" fell, striking a longshoreman who was assisting in the operation. According to the Court's opinion:

> Each "bridle" consisted of two lengths of wire cable, each length having a hook at one end, and the other end being fastened to a single common ring. Each hook was passed into a slot at one corner of the "pontoon", and the common ring was passed into the hook at the end of the fall. In this way each "bridle" could lift the "pontoon" at two of its corners, and two "bridles" could lift it at all four corners. Instead of making the two rings fast to each other, so as in effect to make a single "bridle" with four lengths of wire, the

rings were left separate on the hook; and in consequence, after the winch had lifted the "pontoon" a short distance from the dock, it tilted, the two rings separated and one of them slipped out of the hook, dropping one end of the "pontoon". [185 F. 2d at 556].

In *Strika,* improper use of "bridles," *themselves neither defective nor broken,* rendered the ship unseaworthy. Here, the misuse of an open cargo hook, conceded by shipowner to be *"criminally"* unsuitable to lower the ladder, renders the vessel unseaworthy. There are, moreover, additional factors not present in *Strika* which, coupled with the patently improper rigging, support the finding of unseaworthiness.

First, we are not presented with a situation where holding the ship unseaworthy would in effect require shipowner to supervise every minutes phase or step in a large unloading operation. Here, no large unloading operation was taking place at Hatch #4—the only job to be done at the time and place of the accident was lowering and rewelding the ship's ladder to the ship's structure.

The job of lowering and rewelding the ladder, furthermore, was not one of the typical, routine and ordinary jobs of every day which take place during unloading of a sugar ship. Indeed, it had happened only once in four years in plaintiff's experience and only "several times" in the six years Chief Officer Fleming had served aboard the S.S. Madaket (Tr. 83-4, 528-30). The ship was not unaware of the unusual nature of this task; it had given special permission for the removal and its officers were on duty to watch the winches and check to see that the longshoremen did not damage the vessel.

Waterman and I.T.O. contend that this is a simple case of "operational negligence." They assert that the Court of Appeals for the Second Circuit in *Puddu* v. *Royal Netherlands S.S. Co.*, 2 Cir., 1962, 303 F. 2d 752, petition for rehearing in banc denied and reconsideration of denial of petition for rehearing in banc, 1962, 303 F. 2d 752, cert. denied, 1962, 371 U. S. 840, has made plainly clear that "operational negligence" by the contract stevedore is of itself an insufficient basis to sustain a finding of unseaworthiness. See *Spinelli* v. *Isthmian S.S. Co.*, 2 Cir., 1964, 326 F. 2d 870, cert. denied, 1964, 377 U. S. 935, rehearing denied, 1964, 377 U. S. 1010.

While our Circuit has stated that concept as an abstract proposition, and applied it to cases wherein the longshoreman's injury arises from stevedore's negligent performance of detailed phases of routine work, it has not summarily disposed of *Strika*. The sound reasoning there pronounced and recent dicta suggest that it is the particular fact pattern, such as here, which controls. See *Reid* v. *Quebec Paper Sales & Trans. Co., Ltd., supra.* Compare, *DiSalvo* v. *Cunard S.S. Co., Ltd.*, S. D. N. Y., 1959, 171 F. Supp. 813.

Other authority relied upon by Waterman and I.T.O. is not dispositive. Unlike the instant case, in both *Ezekial* v. *Volusia S.S. Co.*, 2 Cir., 1961, 297 F. 2d 215, cert. denied, 1961, 369 U. S. 843 and *Guarrancino* v. *Luckenbach S.S. Co.*, 2 Cir., 1964, 333 F. 2d 646, cert. denied, 1965, —U. S.—, libelants injured themselves. Compare, *Mosley* v. *Cia. Mar. Adra, S.A.*, 2 Cir., 1963, 314 F. 2d 233, cert. denied, 1963, 375 U. S. 829 (possibility that libelant's own conduct was itself the proximate cause of the accident). Here, Skibinski, unaware of the "plan" adopted by his fellow longshore-

men on the main deck above, had no way to ascertain or ameliorate from his position in the depths of the hold the dangerous condition created by the use of the open mouth hook to lower the ship's ladder.

In other cases, the mishap causing the accident occurred during a step or phase of a typical and routine stevedoring operation already in full progress. See *Spinelli* v. *Isthmian S.S. Co., supra,* and *Puddu* v. *Royal Netherlands S.S. Co., supra* (both involving stevedore's *abuse* of equipment); see also, *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 2 Cir., 1954, 213 F. 2d 397; *Ventrone* v. *United States,* E. D. N. Y., 1955, 134 F. Supp. 169, aff'd., 2 Cir., 1957, 239 F. 2d 862; *Massa* v. *C. A. Venezuelan Navigacion,* 2 Cir., 1964, 332 F. 2d 779, cert. denied, 1964, 379 U. S. 914; *Sullivan* v. *United States,* S. D. N. Y., 1961, 203 F. Supp. 496 (wherein libelant had been warned to be alert for falling cartons). In none of these cases was there a finding, as here, of conduct by the stevedore tantamount to "criminal neglect."

As we see it, the concept of unseaworthiness as defined by the Supreme Court and applied in this Circuit, coupled with the non-delegable nature of shipowner's duty, necessitate a finding of unseaworthiness. Indeed, the historic function of the doctrine permits no other finding on the facts of this case.

The availability of shackles which, if used by the longshoremen, would have prevented the ladder from being disengaged does not alter our conclusion. In *Strika,* proper equipment was readily available to the longshoremen. There, they had to use only one "bridle" instead of two, or use the two with suitable attachment. Here, the shackles were placed aside. In action of concedely *"criminal"* pro-

portions, an open mouth hook indisputably unsuitable to the task was used to lower the ship's ladder by the ship's winches, boom and fall. See *Ferguson* v. *Moore-McCormack Lines,* 1957, 352 U.S. 521; *Micholie* v. *Cleveland Tankers, Inc.,* 1960, 364 U.S. 325; *Grillea* v. *United States, supra; Street* v. *Isthmian Lines, Inc.,* 2 Cir., 1963, 313 F.2d 35, cert. denied, 1963, 375 U.S. 819. See also *Ezekiel* v. *Volusia S.S. Co., supra* at 219 (Clark, J. dissenting); *Mosley* v. *Cia. Mar. Adra, S.A., supra* at 230 (Clark, J. dissenting): Shipowner would have this Court find seaworthy an unseaworthy bit of rigging by casting it in a shroud of "operational negligence." We cannot adopt so narrow a construction of the prevailing law as shipowner's formulation envisages. To hold that inexcusable stevedore performance resulting in a situation fraught with danger (so fully realized here) absolves shipowner of liability would render helplessly impotent the staunch protection of non-delegable duty. See *Alaska S.S. Co., Inc.* v. *Petterson, supra.* With such hazardous limitations on responsibility, had stevedore used a "bridle" arrangement as in *Strika* or even hair wire, themselves neither defective nor broken, shipowner would be heard to claim that, under all the circumstances, his ship was reasonably fit. In view of the facts of this case, labelled by shipowner itself as amounting to *criminal* neglect, we cannot so find. We refuse to concede that *Puddu* v. *Royal Netherlands S.S. Co., supra,* holds to the contrary; nor does *Grillea* v. *United States, supra,* dictate otherwise. See *Ferrante* v. *Swedish American Lines,* 3 Cir., 1964, 331 F.2d 571, cert. denied pursuant to Rule 60, 1964, 379 U.S. 801; *Thompson* v. *Calmar,* 3 Cir., 1964, 331 F.2d 657, cert. denied, 1964, 379 U.S. 913. See also *Scott* v. *Isbrandtsen Co.,* 4 Cir., 1964, 327 F.2d 113. Cf. *Arena* v. *Luckenbach S.S. Co.,* 1 Cir., 1960, 279 F.2d 186, cert. denied, 1960, 364 U.S. 895;

McQuiston v. *Freighters and Tankers S.S. Co.*, 5 Cir., 1964, 327 F.2d 746; *Bilbeci* v. *United States*, 9 Cir., 1962, 298 F.2d 703.

Negligence

Ship's officers were on duty on the morning of the accident. Their permission was necessary before Skibinski could proceed. Third-mate Bishop observed the welding equipment being sent down into the hold at Hatch #4 (Tr. 548, 559). He was aware of the task to be performed. Nevertheless, according to his testimony, he neither witnessed the accident nor was in the vicinity of Hatch #4 for at least one half hour prior to the accident (Tr. 549-50).

Plaintiff has failed to show by a preponderance of the evidence that shipowner, despite its actual knowledge of stevedore's job to lower and reweld the ship's ladder to the ship's structure—far from a typical job in connection with an unloading operation—had actual knowledge of the "plan" for the lowering or the dangerous condition created by the improper use of the open mouth cargo hook.

Absent such actual notice of the dangerous condition which caused Skibinski's injuries, we are constrained on the facts of this case to hold that shipowner was not negligent. *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats*, 2 Cir., 1965, —F.2d— (sl. op. 1893ff.). "[A] shipowner who hires a qualified stevedore . . . is not bound to any duty of active supervision of stevedore's work. . . ." *Filipek* v. *Moore McCormack Lines, Inc.*, 2 Cir., 1958, 258 F.2d 734, cert. denied, 1958, 359 U.S. 927.

Indeed, this circuit has emphasized that, despite the nondelegable nature of shipowner's duty to supply a safe place to work, shipowner escapes liability for negligence even

though its personnel observe stevedore's misdeeds. *Berti* v. *Compagnie De Navigation Cyprien Fabre, supra, Filipek* v. *Moore McCormack Lines, Inc., supra; Gallagher* v. *United States Lines, Co.*, 2 Cir., 1953, 206 F.2d 177, cert. denied, 1953, 346 U.S. 897. See *Oblatore* v. *United States*, 2 Cir., 1961, 289 F.2d 400, cert. denied, 1961, 368 U.S. 881.

Contributory Negligence

Waterman and I.T.O. contend that Skibinski's own negligence was a proximate cause of the accident. The argument is predicated primarily upon the testimony of Skibinski's fellow employee and job partner at the time, Herman Stuve, and the asserted natural inferences to be drawn from the location of plaintiff's injuries.

Stuve, an eye-witness, gave a statement to Waterman's investigator on the date of the accident (Tr. 353) and portions of his pre-trial deposition were read into the record (Tr. 571-3, Ex. E). His testimony upon the trial did not materially vary from his prior statements.

According to Stuve, while with Skibinski in the hold, he saw plaintiff take hold of the lower end of the ladder (which was suspended about two or three feet from the floor) when standing at about the middle of hatch area, saw him attempt to swing it into place near the brackets and heard him yell "come on back" (Tr. 571-3, 576, 582-4, 587). These acts, if they occurred, contravene the Maritime Safety Code (Tr. 689).

Skibinski, on the other hand, testified on direct and cross examination that he did not have knowledge of the use of the open cargo hook or of the "plan" (Tr. 81-2, 86, 124-5, 322-4, 404); he was against the skin of the ship bending over to pick up his tools at the time of the accident, not in

the middle of the hatch area (Tr. 88, 93, 214-7); he never touched the ladder (Tr. 94, 221, 235-8); he did not yell "come on back" (Tr. 223). According to his testimony, the ladder fell on him without warning or notice (Tr. 218-9).

Thus, the issue of contributory negligence (as with other phases of the entire trial record) is one of credibility for the trial court to determine. We paid particular attention to the demeanor of the witnesses. Skibinski's testimony was given forthrightly and with conviction. He gave the distinct impression of a cautious workman constantly alert for precipitous and unannounced perils inherent in his assignments. Stuve, on the other hand, was hesitant and his statements lacked the quality of certainty which would lead this Court to adopt his recollection of the events of November 24, 1958. This is not to say that Stuve's testimony was fabricated; rather, it was not rendered with conviction. The Court accepts plaintiff's testimony on this score.

Waterman and I.T.O. argue that the location of Skibinski's injuries gives rise to an inference contradictory to his testimony that at the time of the accident he was not in the middle of the hatch area. We find this argument unpersuasive. We would be piling inference upon inference to reach a conclusion contrary to the lessons of practical experience. In an accident of this nature, where Skibinski was thrown not less than four feet (Tr. 420-1), there is equal merit in recognizing that injuries such as those incurred here would result not only from plaintiff's direct contact with the falling ladder, but also from other contacts by him with the hold's floor or the side of the vessel (see Tr. 195-7).

Accordingly, the Court finds from a quantitative and qualitative viewpoint based upon the entire record, employing those criteria in the pursuit of truth which the law

endorses, that Waterman and I.T.O. have failed to sustain their burden of proof, by a preponderance of the evidence, that plaintiff was contributorially negligent.

Damages

The evidence sustains plaintiff's claims for money damages for past loss of earnings, past hospital and medical care, and both past and future pain and suffering.[4]

1. Loss of Past Earnings

Solely due to the accident, Skibinski was admittedly out of work for a period of 62 weeks: 5 weeks in 1958, 52 weeks in 1959, and 5 weeks in 1960.

During 1958, up to the date of his injuries on November 24, Skibinski earned a total of $6,038.79 (Tr. 108-9). Employed by I.T.O. in the same capacity in 1956 and 1957, he earned gross salaries of $7,205.11 and $7,362.14 respectively (Ex. 1, Tr. 108).

I.T.O. would compute plaintiff's loss of earnings by taking his average weekly earnings during 1958 (c. $128.50) and multiply that amount by total weeks lost (62), reaching an amount of $7,967 ($6,681.20 yearly).

The trier of fact in determining loss of earnings, however, is not here limited to considering only the actual earnings of the 47 week period immediately preceding the accident. See *Alexander* v. *Nash-Kelvinator Corp.*, 2 Cir., 1959, 271 F.2d 524, 527. Plaintiff is entitled to compensa-

[4] By stipulation, I.T.O.'s lien for medical and hospital care provided plaintiff at its expense is in the amount of $2,410.79 (Tr. 235). The expert medical testimony establishes the permanency of plaintiff's injuries and, under the present state of medical science, treatment is limited to the temporary pain palliatives such as aspirin and whirlpool baths (Tr. 189).

tion in the amount he is reasonably certain to have earned during the time lost as a result of the accident, had he not been injured.

Proper factors to be weighed, in addition to actual prior earnings, are plaintiff's work record, the manner in which he normally occupied his time prior to the accident and his earning capacity. Moreover, in computing average weekly earnings, it is appropriate to determine them over a period not unreasonably related to the date of his injury.

In both 1956 and 1957, the total yearly salary paid plaintiff for work of the type done for I.T.O. in 1958 was greater than the amount now urged by I.T.O. as a proper measure of loss of earnings (Ex. 1). We find, for a steady and conscientious laborer such as Skibinski, 47 years of age when injured, that reliance solely on his average weekly salary in 1958 would be unreasonable.

It should be observed that since his return to work, on a different job assignment, plaintiff has earned an average weekly salary exceeding that earned in the years 1956, 1957 and 1958 (Ex. 1). This tends to substantiate that, during the time lost as a result of the accident, Skibinski would be reasonably certain to have progressed in remunerative employment. See *Faudree* v. *Iron City Sand & Gravel Co.*, W.D. Pa., 1962, 201 F. Supp. 447, *aff'd*, 3 Cir., 315 F.2d 647.

Accordingly, the Court is inclined to compete Skibinski's actual loss of earnings by reference to his average weekly earnings over the period January, 1956 to November, 1958, a period not unreasonably related to the date of the accident or the 62 weeks lost thereafter. During 1956, 1957 and 1958, his average weekly earnings were $136.44 (compared to the figure of $128.50 proffered by I.T.O.). See *Porello* v. *United States*, 2 Cir., 1946, 153 F.2d 605, 608, affirmed in part and reversed in part, 1947, 330 U.S. 446.

The Court thus finds that plaintiff is entitled to $8,459.28 (or $7,094.88 computed on a yearly basis) for loss of earnings directly resulting from the accident.

2. Pain and Suffering

Plaintiff was 53 years of age at the time of trial and had a life expectancy of 20.55 years (Tr. 235). We find that since the time of the accident in November, 1958, when he was 47 years of age, to the present, he has not been without pain caused by the accident for any substantial period; further, that he is reasonably certain to continue to experience such pain for the remainder of his natural life.

After being struck by the ladder and attendant severe pain, he did not lose consciousness; he received drugs while in the hospital to aid in reducing pain;[5] he experiences pain while walking or standing, even for relatively short periods of time; he is not without pain when working.[6]

It had not been until March, 1959, some five months after the accident that his cast was removed. Post-hospital treatment, under the supervision of Dr. Sarver up to March, 1960, included exercises and whirlpool treatments.[7]

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[5] The parties stipulated that Skibinski was an in-patient at St. John's Hospital for three periods: November 24, 1958 to December 24, 1958; February 3 to February 6, 1959 and March 23 to March 28, 1959. On those occasions, respectively, he left the hospital in a wheel chair with a cast on his right leg from thigh to toes; on crutches with a cast from his right knee to toes; and without a cast but on crutches. During the first stay in the hospital, he was awakened nightly for a substantial period for injections and embarrassed by his inability to make use of normal lavatory facilities.

[6] Skibinski testified at trial that since the accident he has been unable to work aboard a ship or do the type of work he was accustomed to doing (Tr. 110).

[7] The record does not provide a basis for an award of damages for future medical or hospital care.

Medical science, it appears, cannot alter by operation or treatment the permanency of the following injuries Skibinski incurred or otherwise than temporarily remove his incessant pain and suffering: (1) his right leg is shorter than his left by three-eights of an inch and he will always walk with a limp; (2) actual wasting of the muscles of the right thigh and calf (one inch and three-quarters of an inch respctively); (3) inversion of right foot limited to fifty per-cent; (4) loss of bending capacity of fifty degrees in right knee; (5) scar from compound fracture; (6) swelling of knee, and displacement and bowing out of right femur, tibula and fibula.

In addition to these physical injuries, we find that as a proximate result of the accident plaintiff can no longer participate in numerous activities which, before the accident, were an integral part of his daily life and brought an appreciable degree of delight and contentment.[8] Moreover he cannot walk more than six or seven city blocks or stand more than twenty minutes—in sharp contrast with his physical prowess theretofore—without suffering pain from swelling in his ankles.

Accordingly plaintiff is entitled to monetary compensation for pain and suffering, past and future, causally related to the accident.

Conclusion

The motions for directed verdicts made by plaintiff, defendant and third-party defendant in the main action are denied.

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[8] Plaintiff could no longer participate in sports with his children, roller skate, bowl or dance. At the time of the accident, he was taking special dancing lessons.

Judgment on the main action is rendered in favor of plaintiff and against defendant. Determination of costs and counsel fees, if any, is reserved pending completion of trial and decision on the claim over.

Taking of further proof in this action by defendant against third-party defendant shall resume at a date and time to be appointed.

The foregoing opinion shall constitute partial findings of fact and conclusions of law.

Computation of total damages to be awarded is reserved pending submission by the parties, on three (3) days notice, of proposed findings of fact and conclusions of law, and additional memoranda, if any, within ten (10) days from the filing date hereof.

New York, New York
June 4, 1965

IRVING BEN COOPER
United States District Judge

APPENDIX C

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges,

HON. JOHN F. DOOLING, JR.,
District Judge.

JOSEPH SKIBINSKI,
Plaintiff-Appellee,

v.

WATERMAN STEAMSHIP CORPORATION,
Defendant and
Third-Party Plaintiff-Appellant,

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellant.

Judgment Appealed From

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

APPENDIX D

Orders Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPH SKIBINSKI,

Plaintiff-Appellee,

v.

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellant,

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING

Alexander, Ash & Schwartz,
New York, N. Y., for appellants.

Petition denied.

P.R.H.
U.S.C.J.

J.F.D.
U.S.D.J.

I respectfully dissent.

H.J.F.
U.S.C.J.

Orders Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPH SKIBINSKI,

Plaintiff-Appellee,

v.

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellant,

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Alexander, Ash & Schwartz,
New York, N. Y., for appellants.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

27 April 1966

APPENDIX E

Opinion in *Radovich* v. *Cunard Steamship Co., Ltd.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 342—September Term, 1965.

(Argued April 25, 1966 Decided July 18, 1966.)

Docket No. 29867

MARTIN RADOVICH,

Libelant-Appellant,

—against—

CUNARD STEAMSHIP CO., LTD.,

Respondent-Impleading Petitioner-Appellee,

—against—

JOHN T. CLARK & SON and GOUROCK ROPEWORK CO., LTD.,

Respondents-Impleaded.

Before:

SMITH, KAUFMAN and FEINBERG,

Circuit Judges.

Appeal by libelant from a decree of the Southern District of New York, John M. Cashin, *J.*, entered in favor of shipowner. Reversed.

CHESTER A. HAHN (Sylvia Miller, New York, N. Y., on the brief), *for Libelant-Appellant.*

WILLIAM J. BRENNAN (Lord, Day & Lord, New York, N. Y., on the brief), *for Respondent-Impleading Petitioner-Appellee.*

JOSEPH ARTHUR COHEN (Alexander, Ash & Schwartz, New York, N. Y.; Sidney A. Schwartz, on the brief), *for Respondent-Impleaded-Appellee John T. Clark & Son.*

FEINBERG, *Circuit Judge*:

This is an appeal by libelant Martin Radovich from a decree of the district court dismissing his libel for personal injuries against the shipowner, Cunard Steamship Co., Ltd. For the reasons indicated below, we reverse.

Radovich, a longsoreman, was working aboard Cunard's *R.M.S. Mauretania* on the morning of July 2, 1961, helping to unload cargo. Radovich was on deck as an "extra man," participating in the discharge of automobiles through a hatch. An "extra man" holds a guide line attached to the car to keep it from striking anything on deck as it is carried through the air. Cunard supplied a standard 3¾ inch, three-strand rope for the "Burton" fall, which controls horizontal motion of the cargo. The longshoremen fixed the rope in a single purchase, in which a single length is connected to the wire fall, which controls vertical move-

ment. In a double purchase, two pulleys and two lengths of rope are used, decreasing the speed of the operation but increasing the strength of the rigging. The unloading began with the removal of several small foreign cars; after an hour and a half, the longshoremen attempted to unload a much heavier (3,600 pound) sedan. The car was lifted through the hatch and moved across the deck toward the pier. At a point above the railing, the Burton fall rope parted and the car fell; its sustaining bridle struck and injured Radovich, who was knocked to the deck. The rope supplied by Cunard was new, unused, and without latent defect. Claims of negligence and unseaworthiness were held unfounded by the trial court, and the libel was dismissed. Cunard had impleaded libelant's employer, John T. Clark & Son, and was awarded litigation expenses as against this stevedoring company because of the longshoremen's negligence in using a single purchase.[1]

Radovich argues first that his proof that the rope snapped suddenly in the midst of the ordinary performance of the operation raised a presumption under the doctrine of *res ipsa loquitur* that the rope was insufficient for its intended purpose, and Cunard did not adduce sufficient evidence to explain away or rebut this presumption. This statement of the *res ispa* doctrine is faulty in a number of respects, but it is unnecessary to dwell on this point. It suffices to say that the trial judge found that the rope was new, unused, and without latent defect and broke solely because too great a strain was placed upon it and that these findings are clearly supported by the evidence.

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[1] Cunard had also attempted to implead Gourock Ropework Co., Ltd., the alleged supplier of the rope used by the longshoremen. However, the claim against Gourock was abandoned because Cunard was unable to serve process upon it.

Radovich's other claim is more substantial. The trial judge found that the sedan was too heavy for the single purchase, that the sole reason the rope parted was that the longshoremen tried to lift the car without re-rigging the gear, and that a double purchase would have been effective. Accepting this finding *arguendo*, Radovich concludes that this proves unseaworthiness. The trial court reasoned that the use of the single purchase was the cause of the accident and, being an act, the cause was not a condition (unseaworthiness), but rather was operational negligence by the longshoremen. The cases in this circuit do make a distinction between operational negligence and an unseaworthy condition negligently created,[2] denying the ship's liability in the former case. The distinction was recently re-affirmed in *Norfleet* v. *Isthmian Lines, Inc.*, 355 F. 2d 359 (2d Cir. 1966), and *Skibinski* v. *Waterman S.S. Corp.*, 360 F. 2d 539 (2d Cir. 1966).

The difference between operational negligence and unseaworthiness has been questioned in this circuit[3] and is not accepted in some other jurisdictions.[4] The difficulty lies in defining when negligent conduct ends and an unseaworthy condition begins. The court below characterized the distinction as "metaphysical" and a quick glance at some of our cases engenders sympathy for a trial judge attempt-

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[2] See Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. L. Rev. 819, 827-28 (1963).

[3] See *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34, 37 (2d Cir. 1965). ("One does not have to be unduly cynical to look askance at this distinction, for every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it.")

[4] *Ferrante* v. *Swedish Am. Lines*, 331 F. 2d 571 (3d Cir.), cert. dismissed, 379 U. S. 801 (1964); *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4th Cir. 1964). Contra, *Billeci* v. *United States*, 298 F. 2d 703 (9th Cir. 1962). See also *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 548 n. 11 (1960).

ing to reconcile them. Thus, in *Grillea* v. *United States*, 232 F. 2d 919 (2d Cir. 1956), a leading case on this point, the wrong hatch cover was placed over a pad-eye "only a short time" before libelant, a longshoreman, stepped on it and it gave way beneath him. This was held (2-1) to constitute a condition of unseaworthiness. On the other hand; in *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752, 756 (2d Cir.) (*per curiam en banc*), cert. denied, 371 U. S. 840 (1962), also frequently cited on this issue, a boom buckled while a rain tent was being raised and the falls of a winch were being stretched to a dangerously large angle. This court affirmed (7-2) a finding that no condition of unseaworthiness had been created. In *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (2d Cir. 1950), cert. denied, 341 U. S. 904 (1951), the manner of hooking up two bridles to lift a heavy piece of metal was unsafe and rendered the ship's gear unseaworthy. In *Skibinski* v. *Waterman S.S. Corp., supra*, plaintiff was injured because an open-mouth cargo hook without any locking device was used to lower a ladder which fell upon plaintiff; this court affirmed (2-1) a finding that the ship was unseaworthy. In *Massa* v. *C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2d Cir.), cert. denied, 379 U. S. 914 (1964), this court affirmed a finding that pallets hooked to a loading mechanism were reasonably fit, even though tongs had been placed in the wrong holes. In *Spinelli* v. *Isthmian S.S. Co.*, 326 F. 2d 870 (2d Cir.) (*per curiam*), cert. denied, 377 U. S. 935 (1964), the trial judge found that a winch was not defective and that the accident happened because a stevedore changed from loads of six pipes on a winch to loads of nine pipes, thus creating too much of a strain on the winch; this court affirmed a finding that there was no unseaworthiness. In *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340

F. 2d 34 (2d Cir. 1965), this court affirmed (2-1) a finding that a ladder, which a fellow-worker failed to secure, rendered the ship unseaworthy.

If anything emerges from these cases other than the difficulty of applying the act-condition (or operational negligence-unseaworthiness) dichotomy, it is that the findings of the trier of fact should be left undisturbed, if the law to be applied to the facts is properly understood. Thus, *Puddu, Spinelli, Massa, Reid, Skibinski,* and *Strika* were all affirmances of the trier of fact (the jury in the last case; the judge in the others).[5] We believe that when the jury is properly instructed as to the law, the findings on the issue of whether operational negligence had given way to a condition of unseaworthiness should ordinarily be left undisturbed, even though a different jury might reach a contrary result. Since this assumes a correct impression of the governing law by the trier of fact, when the instructions are improper, the verdict cannot stand. *Norfleet* v. *Isthmian Lines, Inc., supra.* Similarly, while there may be less leeway for inconsistent results when the trier of fact is a judge, see *Mamiye Bros.* v. *Barber S.S. Lines, Inc.,* 360 F. 2d 774 (2d Cir. 1966), here too the finding should ordinarily stand unless the court manifests an incorrect conception of the applicable law.

Applying these standards to this case, it is clear that Judge Cashin felt himself bound by two cases he considered indistinguishable from his own: *Puddu* v. *Royal Netherlands S.S. Co., supra,* and *Spinelli* v. *Isthmian S.S. Co., supra.* Thus, he stated:

> In substance, this case is indistinguishable from the *Puddu* and *Spinelli* cases, *supra.* Too much stress was

[5] In *Grillea,* the trier of fact apparently did not reach the issue.

placed on serviceable equipment and that directly resulted in the injury to the libellant. In this Circuit such an act is operational negligence—it does not create an unseaworthy condition.

However, those cases did not preclude a finding of unseaworthiness by the court below. In *Puddu* and *Spinelli*, as indicated above, the issue was whether the (judge-made) findings of the trial court were clearly erroneous. By the same token, these cases did not hold that a contrary finding would have been clearly erroneous. If anything, *Strika* and *Skibinski, supra,* would seem closer to this case than *Puddu* and *Spinelli*. In both, unseaworthiness was based upon the type of loading mechanism used by longshoremen (in *Strika,* two bridles, instead of one, to lift a heavy piece of metal, and in *Skibinski,* an open-mouth ("S" shaped) cargo hook to lower a ladder). Both cases are strikingly similar to the instant case where use of a single strand of rope in a lifting operation, rather than a double strand, created a dangerous condition. Cf. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423 (1959) (winch safety catch adjusted beyond the tolerance of the load). Therefore, since the court incorrectly regarded itself as bound to apply the operational negligence doctrine, we reverse. Upon retrial, the court can focus on the key issues of precisely what the act of "operational" negligence was, and whether that negligent act had come to a stop before the injury occurred. For example, there is a difference between an unsafe plan of operation, which creates a dangerous condition from the beginning of its execution, and a faulty execution of a proper plan. In determining the "act" of negligence, the trial court would have to decide whether use of the single-purchase to lift the 3,600 pound sedan was such a

negligent plan which created the dangerous condition immediately upon its inception.

While we feel that the single-purchase was inappropriate and unreasonable for the use it was applied to, and that at the time the lifting of the heavier sedan began a condition of unseaworthiness already existed, we would not necessarily reverse a contrary determination on these key issues by a trial court not mistaken as to its power under the applicable law. Our dissenting brother does not want to "inflict on the district court the impossible task of dealing with words and phrases that are like beads of quicksilver." If by this he means the distinction between operational negligence and an unseaworthy condition, we agree, as indicated above, that it is difficult to draw the line between them. A position that it is impossible to do so with fairness and reason in fact poses the question of whether the distinction should not be dispensed with altogether. However, we leave that issue for another day; we simply hold today that the facts in the instant case allow a finding of actionable unseaworthiness, and that any impression gleaned from our prior decisions that such a finding is impermissible is erroneous.

Reversed and remanded for proceedings consistent with this opinion.

KAUFMAN, *Circuit Judge* (dissenting):

Since my brothers agree that it is difficult to see any real distinctions between cases where the stevedore lost and those where he won, *compare*, e.g., *Massa* v. *C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2d Cir.), *cert. denied*, 379 U. S. 914 (1964) with *Strika* v. *Netherlands Ministry*

of Traffic, 185 F. 2d 555 (2d Cir. 1950), *cert. denied*, 341 U. S. 904 (1951), I cannot, in good conscience, become a party to simply an exercise in skillful rhetoric—and inflict on the district court the impossible task of dealing with words and phrases that are like beads of quicksilver. Moreover, toiling to impose liability on a shipowner really free from blame because that is the only route to recover a substantial sum from the stevedoring company in light of the limitations in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq., is to put our imprimature on trivial, meaningless and confusing distinctions. Injustices should be remedied by additional legislation; our attempts to do so have served only to obfuscate this area of the law. See Judge Friendly's dissent in *Skibinski* v. *Waterman Steamship Corporation*, —— F. 2d —— (2d Cir. 1966).

The majority opinion, with commendable candor, recognizes that attempting to read a purposeful design into the distinctions between "operational" negligence and unseaworthiness "engenders sympathy for a trial judge attempting to reconcile them." Moreover, the majority, with seemingly great reluctance, reverses Judge Cashin, stating: "If anything emerges from these cases . . . , it is that the findings of the trier of fact should be left undisturbed, if the law to be applied to the facts is properly understood." But, rhyme or reason evades us even when we exert all our energies to reconcile the cases defining "operational" negligence *vis-a-vis* unseaworthiness. Here, we had a flawless rope which all morning long had safely discharged vehicles weighing up to 2,800 pounds. It was then employed, during the same, sustained process of removing cargo and without any significant time lapse, to lift a 3,600 pound car. Is it

not harsh to insist that the ship became unseaworthy because the stevedores did not recognize the 800-pound difference and immediately failed to employ a double instead of a single purchase rope? I see nothing but a continuous action discharging vehicles which lasted all morning—which unfortunately injured Radovich—and I am not able to discern any fine nuances or differences between the facts here and Judge Hays' pointed illustration of one being hit by falling glass. *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752, 757 (2d Cir. 1962) (concurring opinion).

In light of the majority's opinion, I have great difficulty imagining any act of "operational" negligence which cannot by clever advocacy and hair-line distinctions render the shipowner liable for unseaworthiness. And, since the Supreme Court has not spoken finally on this issue, I view the reversal in this case as an unfortunate vehicle for continuing the futile effort to define catchwords which elude grasp.